

# Washington Law Review

---

Volume 42  
Number 2 *Asian Law Symposium*

---

3-1-1967

## Products Liability in Sales Transactions

Satoshi Niibori

Richard Cosway

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wlr>



Part of the [Commercial Law Commons](#)

---

### Recommended Citation

Satoshi Niibori & Richard Cosway, *Products Liability in Sales Transactions*, 42 Wash. L. Rev. 483 (1967).  
Available at: <https://digitalcommons.law.uw.edu/wlr/vol42/iss2/27>

This Article is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact [cnyberg@uw.edu](mailto:cnyberg@uw.edu).

# PRODUCTS LIABILITY IN SALES TRANSACTIONS

SATOSHI NIBORI\* and RICHARD COSWAY\*\*

## I. CONCEPT OF PRODUCTS LIABILITY

Products liability involves the vulnerability of a supplier of goods in a sales transaction to compensate for defects in the goods and for harm or injury resulting from those defects. The discussion of Japanese law which follows deals with the liability of manufacturers. It does not extend to liability of wholesalers and retailers, since there is no Japanese case authority in point.<sup>1</sup> In the United States, manufacturer's liability is involved in many of the cases and in much of the literature, but there is a vast amount of additional authority involving the liability of wholesalers and retailers. Because some of the theories of liability operate differently vis-à-vis these suppliers, some attention is given in the discussion to their vulnerability.

The person to whom the duty of making compensation may be owed is identified, for the purposes of this article, as the consumer. This term is appropriate enough if it be kept in mind that others, such as victims of auto accidents caused by defects in vehicles other than theirs, may sustain compensable injuries through defective goods.<sup>2</sup> One must also keep in mind that the consumer is not always the buyer, a matter which has been troublesome, as this discussion will develop.<sup>3</sup>

---

\* Staff, Mitsui & Co. (U.S.A.), Inc. LL.B., 1958, Tokyo University.

\*\* Professor of Law, Southern Methodist University. A.B., 1935, Denison University; LL.B., 1942, Cincinnati.

<sup>1</sup> In theory, wholesalers and retailers could be held liable under a tort or contract analysis (see Part IV *infra*), but a search by the Japanese co-author revealed no record of a lawsuit against such persons. Presumably, this absence of cases is because of the extreme difficulty in proving fault on the part of wholesalers and retailers. In *Schwartz v. Macrose Lumber & Timber Co.*, 50 Misc. 2d 1055, 272 N.Y.S.2d 227 (1966), a Japanese middleman who supplied nails was held liable, where privity existed, without reference to the Japanese Law.

<sup>2</sup> In *Piercefield v. Remington Arms Co.*, 375 Mich. 85, 133 N.W.2d 129 (1965), 25 Mo. L. REV. 267 (1965), 42 N.D.L. REV. 408 (1966), 41 WASH. L. REV. 161 (1966), a bystander was injured by the explosion of a defective shotgun shell. Lack of privity did not bar his recovery. *Contra*, *Berzon v. Don Allen Motors*, 23 App. Div. 2d 530, 256 N.Y.S.2d 643 (1965). For a general discussion, see Note, 64 COLUM. L. REV. 916 (1964); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 819 (1966).

<sup>3</sup> *Hochgertel v. Canada Dry Corp.*, 409 Pa. 610, 187 A.2d 575 (1963), denied recovery under UNIFORM COMMERCIAL CODE [hereinafter cited as UCC] § 2-318 to an employee of the purchaser. In *Yentzer v. Taylor Wine Co.*, 414 Pa. 272, 199 A.2d 463 (1964), however, an employee in much the same situation was held to be the buyer, though in all candor the employer was the buyer, having acted through the medium of the plaintiff. And in a more recent Pennsylvania decision, *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966), a seller was held liable for injuries suffered

Suffice it here to state that the responsibility of the supplier here contemplated runs to a buyer of goods and arguably at least to any third person who may be reasonably expected by the supplier to be harmed through use of the goods, if they are defective.<sup>4</sup>

Cases involving personal injury are of most concern because of their human interest and economic value, so most of the following discussion relates to those cases. Not to be overlooked, though, is the seller's liability for economic loss, which is divisible into (1) loss of value of the goods,<sup>5</sup> and (2) other loss, such as property damage, consequent on use of the goods.<sup>6</sup> A buyer may surely expect, without much fuss, a return of his purchase price should the goods be defective. Resistance to the request for compensation may be expected to be directly proportional to the amount of loss claimed.

## II. SETTLEMENT BY COURT AND BY THIRD PARTY

The Japanese consumer would appear to be much less litigious than his American counterpart. Too rare are the suits in Japan involving products liability. Many instances of compensable harm have gone unredressed because of a reluctance to sue. Products liability cases are, however, sufficiently numerous in America to warrant particular-

---

by a bystander when a beer keg, purchased by the injured party's father, exploded. See Note, 14 CATHOLIC U.L. REV. 133 (1965).

<sup>4</sup> The possible plaintiffs may be limited by such things as:

(a) A general principle of foreseeability, as in the case of unusual use of a product culminating in injuries to persons not typically exposed. See 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 15.02 (1965). On the general test of foreseeability, see RESTATEMENT (SECOND), TORTS § 395 (1965).

(b) A general requirement of privity, as was historically required in tort and is, to some extent at least, applied in contract or warranty law currently. See Sedgwick, Conley, & Sleight, *Products Liability: Implied Warranties*, 48 MARQ. L. REV. 139, 152 (1964); RESTATEMENT (SECOND), TORTS § 402A (1965).

(c) The language of a statute, describing protected persons as "buyer," see UNIFORM SALES ACT § 15(1), or responsible persons as "seller." See UNIFORM SALES ACT § 15; UCC §§ 2-312, 2-313, 2-314.

<sup>5</sup> In the United States loss of the bargain is directly dealt with by warranty liability, but liability for negligence and strict liability are in terms of personal injuries or economic loss consequent upon defects in goods. See UCC § 2-714(2); RESTATEMENT (SECOND), TORTS §§ 395, 401, 402A (1965).

<sup>6</sup> Technical rules for protection of the supplier, such as the requirement of privity, have generally been first abandoned in personal injury cases. Illustrative is *Trans World Airlines, Inc. v. Curtiss-Wright Corp.*, 1 Misc. 2d 477, 148 N.Y.S.2d 284 (Sup. Ct. 1955), 30 ST. JOHN'S L. REV. 304 (1956).

In Ohio, for example, as late as 1953, lack of privity barred recovery from the manufacturer of an electric blanket for damages caused to a bed and house which burned. *Wood v. General Elec. Co.*, 159 Ohio St. 273, 112 N.E.2d 8 (1953). Yet as early as 1928, personal injuries were recognized as compensable without privity. *Ward Baking Co. v. Trizzino*, 27 Ohio App. 475, 161 N.E. 557 (1928). It was, finally, in a personal injury case that the Ohio court made its greatest departure from the privity requirement. *Rogers v. Toni Home Permanent Co.*, 167 Ohio St. 244, 147 N.E.2d 612 (1958). See also *Lonzrick v. Republic Steel Co.*, 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966).

ized treatment in textbooks and periodicals.<sup>7</sup>

The Japanese experience seems to reflect a more general phenomenon—lawsuits are seldom used in Japan as the means of resolution of private disputes. The people in Japan apparently do not like to bring their troubles into court. One reason for this is that lawsuits take at least a few years to reach their final goals. Further, they are quite expensive. More to the point, and much more significant however, seems to be the undeveloped, or underdeveloped (from American standards), sense of the significance of legal right and wrong. The people are generally not sympathetic with one who instigates a lawsuit, and he is frequently told, "You could have found another appropriate way to settle the trouble without resorting to a lawsuit."

Thus, though the daily papers in Japan cite numerous instances of injuries for which a supplier would seem to be liable, injured parties rarely sue. This seemingly underdeveloped sense of legal right and wrong probably stems from the unfortunate experience suffered as a consequence of the law's having been a weapon of oppression in the hands of the ruling class. From feudal society through the days immediately before the war, the law's protection was not a vital reality to the public. Consequently, when trouble occurs, the injured party depends on district bosses or administrative authorities for relief. There are many cases in which the district bosses, civil consultants of the police, or other central administrators acted as intermediaries. For instance, in the famous dry milk poisoning case in 1955, a so-called Five Man Committee (*gonin-iinkai*), organized through the mediation of the Ministry of Welfare, expressed an "opinion" which was the basis for the milk products company's payment of compensation. This case will be fully discussed later, but it is noteworthy that the milk products company had promised to fulfill the settlement procedures indicated by the Committee's "opinion."<sup>8</sup>

Such settlements by nonjudicial means require little time or money, and there is much to be said for them, *if* they are fair to all concerned. Generally speaking, however, unlike court decisions, such determinations tend to favor the strong rather than the weak. Consequently,

---

<sup>7</sup> Helpful treatises are FRUMER & FRIEDMAN, *PRODUCTS LIABILITY* (1965); HURSH, *AMERICAN LAW OF PRODUCTS LIABILITY* (1961). "Products Liability" is not yet recognized by the West Publishing Co.'s American Digest System, but until the *Fourth Decennial Digest* (1926-1936) no separate classification was given to Workmen's Compensation cases either. Beginning sometime after 1960, and not before, the *Index to Legal Periodicals* adopted "Products Liability" as a separate subject classification.

<sup>8</sup> KATŌ, *FUHŌKŌIHŌ NO KENKYŪ* (Study of the law of torts) 162 (1961).

the damages awarded to the injured party are often small.<sup>9</sup> A fair conclusion, then seems to be that the disadvantages of cost and delay when resorting to court determination are small in contrast to the often unfair results of third party mediation.<sup>10</sup>

### III. CRIMINAL RESPONSIBILITY OF THE SUPPLIER

#### A. In America

The American reader will recall that strict criminal liability, which is comparatively rare, appeared early in the adulterated food cases.<sup>11</sup> No doubt this kind of liability, along with liability under various food and drug statutes, is a matter of consequence to involved producers.<sup>12</sup> No doubt, further, the quantity of such detailed rules and regulations would be imposing, even in fields other than food and drug. Still, one would believe that fear of criminal sanctions, in the sense about to be emphasized in the following discussion of Japanese law, is not a substantial factor in the law of products liability in the United States.

In the United States the *mens rea* concept seems to be at the heart of the matter, making conviction for a major crime an unlikely consequence of inadvertent error.<sup>13</sup> Illustrative is *People v. Stuart*,<sup>14</sup> wherein the defendant, a druggist, was charged with manslaughter. The death was consequent upon the deceased's having taken prescription drugs, provided by the defendant, containing sodium nitrate not called for in the prescription. This lethal drug appears to have been

<sup>9</sup> KAHŌ, FŪHŌKŌI (Torts) 56, in 22 HŌRITSUGAKU ZENSHŪ (1957).

<sup>10</sup> The American author has nothing to contribute to the foregoing except to observe, for the benefit of our Japanese friends, that similar problems face American courts and litigants. No effort has been made to compare the relative speed of conflicts settlement in the two countries, a matter of obvious interest but of equally obvious difficulty of ascertainment. The frequent resort to commercial arbitration in America may be ascribed, in part, to dissatisfaction with the judicial process. Even Shakespeare pondered why more folk do not practice self-destruction rather than bear "the law's delay."

<sup>11</sup> See Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 64 (1933).

<sup>12</sup> See, e.g., Rosner, *Criminal Liability for Deceiving the Food and Drug Administration*, 20 FOOD DRUG COSM. L.J. 446 (1965).

<sup>13</sup> It may be noted, however, that Washington has convicted a druggist of manslaughter where death resulted from drinking wood alcohol supplied by him in an unlabeled bottle. *State v. Takano*, 94 Wash. 119, 162 Pac. 35 (1916). The more usual American pattern, though, is to require "gross" or "criminal" or some other pejorative negligence to sustain a manslaughter conviction. See CLARK & MARSHALL, CRIMES § 5.09 (6th ed. 1958); Annot., *Criminal Responsibility of Druggist for Death or Injury in Consequence of Mistake*, 55 A.L.R.2d 715 (1957). Washington, among very few states, supports conviction based upon simple failure to use due care. See, e.g., *State v. Brubaker*, 62 Wn. 2d 964, 385 P.2d 318 (1963); *State v. Hedges*, 8 Wn. 2d 652, 113 P.2d 530 (1941).

<sup>14</sup> 47 Cal. 2d 167, 302 P.2d 5 (1956), 55 A.L.R.2d 705.

mixed with a drug that was called for by the prescription. In short, the proper drug was adulterated by the presence of the sodium nitrate. The defendant, though, did not know this, and observation alone would not have revealed it. The court's opinion adroitly refuses to accept some appealing arguments of the prosecutor, all pointing toward some form of strict liability because of a statutory rule.<sup>15</sup> There may well be strict criminal liability under statute for selling an adulterated drug, but this does not carry so far as to permit strict criminal responsibility for the death. This is the kind of decision one would expect generally in products liability cases in the United States. Violation of some strictly apposite technical rule will be punished, but application of a broader rule of law, involving substantial criminal penalties, will be precluded unless *mens rea* is present.

### B. In Japan

There are few Japanese examples of penal cases culminating from defective products. When a consumer is killed or injured because of defects in merchandise, however, the manufacturer may be subject to article 211 of the Japanese Criminal Code,<sup>16</sup> punishing accidental homicide and injury *in the conduct of a business*. The rarity of the cases arising under article 211 is probably due to procuratorial decisions against prosecution or to private negotiations.

In the summer of 1955, however, the Chūgoku and Shikoku districts of Japan were visited by a strange disease affecting infants. Great was the shock when it was recognized that the disease was traceable to dry milk manufactured by the Tokushima works of one of Japan's chief dairy products companies, Morinaga. A total of 113 persons died and 11,778 were injured through consumption of the product.<sup>17</sup> The general manager and production manager of the Tok-

<sup>15</sup> The opinion was well-written, as is his custom, by California Chief Justice Traynor whose role in the area of products liability has been monumental. Much of the common law of strict products liability can be traced to his decisions. *E.g.*, *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 27 Cal. Rep. 697, 377 P.2d 897 (1962). Thus, it is significant that he would not impose *strict criminal* responsibility.

<sup>16</sup> JAPANESE CRIMINAL CODE art. 211:

A person, who fails to use such care as is required in the performance of profession, occupation or routines and thereby kills or injures another, shall be punished with imprisonment for not more than three years or a fine of not more than one thousand yen....

[Translation from 2 Eibun hōreisha Law Bulletin Series No. 2400 (1965), hereinafter cited as EHS.] The fine is now fifty times the figure there stated. *Bakkintō rinjisochihō* (Temporary fines administration law) art. 3 (Law No. 251, 1948) in 2 EHS No. 2402 (1965).

<sup>17</sup> *Morinaga junmyū chūdoku jiken no hoshōtō ni kansuru ikensho* (Opinion on the compensation in the Morinaga powdered milk poisoning case), 103 JURISUTO 49 (1956); KATŪ, *op. cit. supra* note 8, at 162.

ushima works were charged with accidental homicide under the above cited Criminal Code provision, the theory being that the deaths were due to arsenic poisoning, and that arsenic had entered the product through its use as a stabilizer of sodium phosphate. The prosecutor contended that since the dry milk was intended for babies, both defendants were under an absolute duty to prevent harmful materials from entering the mixture. Further, since the chemical used was not one generally used in food products, but was used mainly for industrial purposes, the defendants should have been aware that such a product might not be free of harmful contaminants. Thus, the defendants, if they were to use sodium phosphate, had a duty to insure that it was free of contaminants. Such duty includes investigating the manufacturer's processes, or obtaining an analysis certificate. According to the prosecutor, the defendants should have at least checked the chemical's color, form, and purity by chemical analysis.

After a long-continued trial, the Tokushima District Court on October 25, 1963, held that the defendants were innocent.<sup>18</sup> As to alleged negligence in ordering the chemical, the court opined that the defendants were not under a duty to use only chemicals listed in the Japanese pharmacopoeia, nor were they under a duty to investigate the supplier's processes. Further, they were not obligated to insist upon a chemical analysis certificate. Regarding negligence after the defendants had received the materials, the court held that it was natural that they had assumed and believed that the chemicals supplied were of the same quality as those previously supplied, and, absent some special reason, they were under no duty to test. There might have been a duty to test had there been reason to doubt the quality of the product, but not otherwise.<sup>19</sup> The judgment of the district court has been generally approved by Japanese legal scholars.<sup>20</sup>

Accidental crimes are difficult to analyze under any legal system, but under Japanese law it is quite clear that the defendant will be held culpable only if he is found to have been negligent.<sup>21</sup> This involves perhaps two aspects: *first*, it must be determined whether the defen-

<sup>18</sup> 5 Kakyū keishū 977 (Tokushima Dist. Ct., Oct. 25, 1963).

<sup>19</sup> The case is still pending on appeal. [Subsequent to this writing the Takamatsu High Court reversed and remanded the case to the Tokushima District Court; the official text of the High Court decision is not yet available, so the basis of the reversal cannot now be told.—Ed.]

<sup>20</sup> See, e.g., Inoue, *Morinaga dorai miruku chūdoku jiken no hanketsu* (Decision in the Morinaga powdered milk poisoning case) (pts. 1-2), 36 Hōritsu jihō, March 1964, p. 65; April 1964, p. 66.

<sup>21</sup> INOUE, HANREI NI ARAWARETA KASHITSUHAN NO RIRON (The theory of criminal negligence in case law) 29-30 (1962).

dant could objectively foresee the results which occurred. If he could not, the defendant is innocent. If he could, then a *second* question is presented: what could the defendant have done to avoid the results? The test will usually be that of an ordinary man, but if the defendant conducted a business, the court will evaluate his conduct in light of his experience and expertise as a businessman. A businessman is deemed to foresee more clouded risks and imagine more varieties of evasive action. In Japan, as in common-law countries, there is no criminal culpability for pure mischance. Thus, in the milk case, the district court's judgment is reasonable, for there was no foreseeability of the result even on the standard of businessmen with the defendants' experience.

In summary, then, the American and Japanese law with respect to criminal liability would probably have resulted in identical decisions in each of the cases cited. The American law, based upon English precedent, has apparently tended to require something (intensely hard to identify) above and beyond simple carelessness as a basis for culpability in the manslaughter or "negligent homicide" cases. In Japan, and in some American states, any failure to exercise due care is sufficient for culpability for consequential deaths or injuries.

#### IV. CIVIL LIABILITY OF THE MANUFACTURER IN JAPAN— BACKGROUND

Under Japanese law the manufacturer may be civilly liable in either or both of two ways: tort or contract.

##### *A. Tort Liability*

Article 709 of the Japanese Civil Code provides: "A person who violates intentionally or negligently the right of another is bound to make compensation for damage arising therefrom."<sup>22</sup>

It is obvious that defects are actionable under this provision if they are traceable to the manufacturer's negligence or if they are the means he has selected to inflict intentional harm.

##### *B. Contract Liability*

Article 415 of the Japanese Civil Code provides, in part: "If an obligor fails to effect performance in accordance with the tenor and purport of the obligation, the obligee may claim damages . . . ."

---

<sup>22</sup> This translation, and those of Japanese Civil Code provisions which follow, are taken from 2 EHS No. 2100 (1966).



Under this section, if a "warranty" is expressly agreed upon by the parties to a sales contract, breach of such provision would give rise to breach of contract.<sup>23</sup> Thus, if a seller should warrant to the buyer that the goods are free from defects, but in fact the goods are defective, the seller has breached his promise to provide goods free from defects. If the defect causes a foreseeable personal injury, the injured party can recover damages—at least theoretically—from the seller. Of course, as in all contract actions, there must be privity of contract between the injured party and the warrantor.

It is evident that to recover under article 415 the "warranty" must be a contractual provision agreed upon by the parties. Unlike American law, Japanese law does not imply in sales contracts a warranty that the goods will be free from defects. The Japanese doctrine which is perhaps closest to what Americans would term "implied warranty" is the principle of Latent Defects (*kashi tampo*). Derived from Civil Code article 570,<sup>24</sup> the principle of latent defects has been judicially construed to imply standards of quality in situations where American courts might reach the same result with resort to implied warranties.<sup>25</sup> But, as is the case under article 415, a party must be in privity of contract to benefit from any implied standard of quality.

### C. Concurrence of Tort and Contract Liability

As stated, contract liability requires privity; tort liability does not. In any case, then, where privity exists and where fault (negligence or intention to inflict harm) on the manufacturer's part can be shown, the consumer has remedies in both tort and contract.<sup>26</sup> Thus, there

---

<sup>23</sup> The scope of damages arising from breach of contract is defined in JAPANESE CIVIL CODE art. 416:

(1) A demand of compensation for damages shall be for the compensation by the obligor of such damages as would ordinarily arise from the non-performance of an obligation.

(2) The obligee may recover the damages which have arisen through special circumstances too, if the parties had foreseen or could have foreseen such circumstances.

<sup>24</sup> JAPANESE CIVIL CODE art. 570: "If any latent defects exist in the object of a sale, the provisions of Article 566 shall apply ...." Article 566 provides essentially that when the buyer is unaware that the object of sale is encumbered, and because of such encumbrance the object of the contract cannot be attained, the buyer is entitled to rescission. When the object of the contract can be attained despite encumbered goods, the buyer cannot rescind, but he is entitled to claim damages.

<sup>25</sup> For detailed discussions of *kashi tampo* liability elsewhere in this symposium, see Kanzaki & Jones, *Problems of Performance of Sales Contracts Under Japanese and American Law*, 42 WASH. L. REV. 415, 423-26 (1967); Akamatsu & Bonneville, *Disclaimers of Warranty, Limitation of Liability, and Liquidation of Damages in Sales Transactions*, 42 WASH. L. REV. 509, 513-23 (1967).

<sup>26</sup> KATŌ, *op. cit. supra* note 9, at 46-48.

are concurrent theories of responsibility, giving the option, according to the Japanese courts and most legal scholars, to pursue either approach, or both. There is a minority scholars' view, however, which argues that absent an intention to inflict harm the contractual remedy should be exclusive. The argument is that general tort principles should not be applied to situations where the parties have placed themselves in a contractual relationship; rather, contract laws should govern the parties' rights and duties to each other since their contract attempts to define these rights and duties.

#### *D. Comparison of Tort and Contract Liability*

There are certain similarities in applying either Japanese tort or contract liability: (1) In neither tort *nor* contract is the manufacturer liable absent negligence or the intention to inflict harm. The language of Civil Code article 709 quoted above makes this quite clear in the case of tort liability, but it is less clear insofar as liability in contract is concerned.<sup>27</sup> Recent judicial opinions and scholarly expressions of opinion, though, have unanimously required one or the other as a basis of liability.<sup>28</sup> (2) Civil Code article 416, specifying the reasonable sequence of cause and effect as a limitation on the range of damages, applies to both forms of liability.

On the other hand, there are significant differences in Japanese tort and contract liabilities: (1) In the case of tort liability, the plaintiff (consumer) has the burden of establishing the existence of negligence or intentionally inflicted harm. That is to say, he must carry the burden of proof of showing fault. In contract liability, on the other hand, the defendant (manufacturer) bears the burden of showing that there was no negligence. (2) The Japanese Civil Code extinguishes tort claims at the expiration of three years from the discovery of the in-

---

<sup>27</sup> The requirement of negligence under article 415 arises by implication. In addition to that portion quoted in the text *supra*, article 415 provides: "the same shall apply in cases where performance becomes impossible for any cause for which the obligor is responsible."

The term "negligence," as used in this discussion, requires some explanation to the American reader. "Fault" or "responsibility" might have been used; however, the degree of fault or responsibility on the obligor's part necessary to impose article 415 liability is such that it closely resembles what Americans would term "negligence."

<sup>28</sup> Ishimoto, *Kashitsu no yōken* (Elements of negligence), in 9 Sōgō HANREI KENKYŪ SŌSHO, MIMPŪ (Comprehensive case study series, civil law) 3-4 (1964).

This concept, strange to American readers, appears to have been (and to some extent still to be) a fundamental postulate of civil law. See Kessler, *The Protection of the Consumer under Modern Sales Law, Part I*, 74 YALE L.J. 262, 272-77 (1964).

juries,<sup>29</sup> but in contract claims the statutory period of limitations is ten years.<sup>30</sup>

On the basis of this comparison it would seem that persons injured by defective products would prefer to seek redress on the contractual liability theory, since the defendant would have the burden of proving lack of fault on his part and because the statute of limitations is longer. Yet, the authors have found no reported Japanese cases allowing a products liability recovery based on breach of contract. This is perhaps explained by the privity requirement. For all practical purposes, this obstacle is insurmountable even where there is an express warranty of quality, or where such warranty is implied under the latent defects principle. The person injured by a defective product would seldom, if ever, be fortunate enough to be a party to the sales contract giving rise to the warranty of quality, whether such warranty be express or implied.

#### V. CIVIL LIABILITY OF THE SUPPLIER IN AMERICA—BACKGROUND

Obvious differences among the various jurisdictions make a generalization vague, misleading, or both. Further, if it is really true that the "dam" which has heretofore pent up consumers in their quest for compensation has "busted,"<sup>31</sup> even an accurate statement of what the law now is in most states will hardly be meaningful tomorrow. With these cautions, one may make a broad comparison between the Japanese law just related and the law in the United States.

The distinction between "contract" and "tort" liability is, to the eyes of proponents of increased manufacturer's liability, becoming less and less clear.<sup>32</sup> The reason for this is that each theory, taken

---

<sup>29</sup> JAPANESE CIVIL CODE art. 724:

The right to demand compensation for the damage which has arisen from an unlawful act shall lapse by prescription if not exercised within three years from the time when the injured party or his legal representative became aware of such damage and of the identity of the person who caused it, the same shall apply if twenty years have elapsed from the time when the unlawful act was committed.

<sup>30</sup> JAPANESE CIVIL CODE art. 167:

(1) A claim shall lapse if it is not exercised for ten years.

(2) A property right other than a claim or ownership shall lapse if it is not exercised for twenty years.

<sup>31</sup> Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)* 69 YALE L.J. 1099, 1113 (1960). This article is a modern classic and a departure point for most of the current trends in products liability.

<sup>32</sup> See, e.g., RESTATEMENT (SECOND), TORTS § 402A, comment *m* (1965):

A number of courts, seeking a theoretical basis for the liability, have resorted to a "warranty" .... In some instances this theory has proved to be an unfortunate one. Although warranty was in its origin a matter of tort liability, and it is generally agreed that a tort action will still lie for its breach, it has be-

alone, puts obstacles in the way of plaintiff's recovery, yet each tends to remove the obstacles posed by the other.<sup>33</sup>

If negligence is the basis for the liability sought to be imposed, the plaintiff must establish with some particularization just how the defendant failed to exercise due care. The fault may lie in design<sup>34</sup> or in manufacturing process,<sup>35</sup> or in failure to warn or instruct about conditions of use,<sup>36</sup> but fault there must be. To this extent, then, American law and Japanese law are similar. The doctrine of *res ipsa loquitur* may supply part of the plaintiff's case,<sup>37</sup> and here the analogy to the Japanese law of contract liability is striking. If the defect is one that would not have been found had due care been exercised, let the defendant (manufacturer or seller) show that he did exercise due care and, in spite of that, the defect appeared. This doctrine, though, has been viewed as insufficient protection to the consumer, if for no other reason than that it tends to minimize verdict amounts against suppliers who have established compliance with commonly accepted performance standards.<sup>38</sup>

---

come so identified in practice with a contract of sale between the plaintiff and defendant that the warranty theory has become something of an obstacle to the recognition of strict liability where there is no such contract. There is nothing in this Section which would prevent any court from treating the rule stated as a matter of "warranty" to the user and consumer. But if this is done, it should be recognized and understood that the "warranty" is a very different kind of warranty from those usually found in the sale of goods, and that it is not subject to the various contract rules.

<sup>33</sup> See Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 364-65 (1965).

<sup>34</sup> See, e.g., 1 FRUMER & FRIEDMAN, *op. cit. supra* note 7, § 7; Baur, *Manufacturer's Liability for Negligent Design*, 14 DRAKE L. REV. 117 (1964); Noel, *Recent Trends in Manufacturers' Negligence as to Design, Instructions or Warnings*, 19 SW. L.J. 43 (1965); Noel, *Manufacturer's Negligence of Design or Directions for Use of Product*, 71 YALE L.J. 816 (1962).

The manufacturer is not an insurer that his product will injure no one. Thus a boy who walked into an automobile was denied recovery for the loss of an eye caused by a protruding ornament in *Hatch v. Ford Motor Co.*, 163 Cal. App. 2d 393, 329 P.2d 605 (1958). See also 1 FRUMER & FRIEDMAN, *op. cit. supra* note 7, § 7.01(3). There must be the foreseeability of more than trivial harm. See Noel, *Recent Trends in Manufacturers' Negligence as to Design, Instructions or Warnings*, 19 SW. L.J. 43, 45 (1965). The manufacturer must use reasonable care, including care in basic design, to prevent such harm. See RESTATEMENT (SECOND), TORTS § 395 (1965), particularly comment f.

<sup>35</sup> See 1 FRUMER & FRIEDMAN, *op. cit. supra* note 7, § 6.

<sup>36</sup> See 1 HURSH, *AMERICAN LAW OF PRODUCTS LIABILITY* § 2.28-.39 (1961). In *Hubbard-Hall Chem. Co. v. Silverman*, 340 F.2d 402 (1st Cir. 1965), the court dealt with a rather long and detailed warning, which explained that the product (an insecticide) might be fatal, if swallowed, and gave instructions as to use. The very length and detail of the warning may have been the undoing of the manufacturer, because it was held liable to the estate of a non-English speaking farm laborer. In substance, a skull and cross-bones might have been more helpful, because the use by uneducated farm laborers ought to have been foreseen. See Note, 15 DE PAUL L. REV. 211 (1965). See also *Weekes v. Michigan Chrome & Chem. Co.*, 352 F.2d 603 (6th Cir. 1965).

<sup>37</sup> See P. Keeton, *Products Liability—Problems Pertaining to Proof of Negligence*, 19 SW. L.J. 26, 35 (1965).

<sup>38</sup> See Prosser, *supra* note 31, at 1116.

The warranty liability of the American manufacturer or seller is not predicated on blameworthy conduct.<sup>39</sup> A supplier may, indeed, establish beyond peradventure of doubt that he exercised reasonable care to perfect his product, and yet if it is not as warranted, the liability is his.<sup>40</sup> This is not to say that express representations, such as those in advertising, may not establish a norm for the product,<sup>41</sup> but it is to observe that the increase in supplier liability has resulted from imposition of warranty quite independent of his express agreement.

The source of the implied warranty liability is itself obscure, but for our purpose it may be traced to statutory enactments, now primarily the Uniform Commercial Code [hereinafter referred to as UCC], though formerly traceable to the Uniform Sales Act, and to judicial pronouncements. The point to be observed is that however complete the warranties stated by statute may appear, there is always the possibility of a court's implying new and greater promises about the goods. In the imposition of liability upon food processors one may find a particularly marked example, for no court is seriously hampered in finding a warranty that food will be fit for consumption without regard to any of the statutory niceties of warranty.<sup>42</sup>

---

<sup>39</sup> This mid-Victorian sounding phrase is used to evade what may be a semantic trap. Had the word "fault" been used, it might have misled. Fault there must be, in the sense of a *faulty product*, but fault there need not be, in the sense of omission of conduct which would have prevented harm. It has been stated that "the mere act of putting a faulty product on the market constitutes fault in this understanding of the term." Cowan, *Some Policy Bases of Products Liability*, 17 STAN. L. REV. 1077, 1089 (1965).

The use of the term "blameworthy conduct" may be unfortunate, in that it raises moral overtones. No such overtones are intended; the supplier is blameworthy if he fails to live up to the standards expected of a reasonably prudent supplier. This kind of liability may be liability without moral fault. See Lucey, *Liability Without Fault and the Natural Law*, 24 TENN. L. REV. 952, 954 (1957).

<sup>40</sup> The meaningful warranties, within the context of this article, are those implied by law, namely the warranty of merchantability, under UNIFORM SALES ACT § 15 and UCC § 2-314; and the warranty of fitness for a buyer's particular purpose under UNIFORM SALES ACT § 15(1) and UCC § 2-315.

<sup>41</sup> As under UNIFORM SALES ACT §§ 12, 14 or under UCC § 2-313.

<sup>42</sup> The requirement of privity, backstopped by the words of the Uniform Sales Act that warranty liability is that of a "seller," might obviously mean that absent the seller-buyer relationship, no warranty liability ought to be imposed. See, e.g., UNIFORM SALES ACT § 12. Beginning with a celebrated Washington decision, *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 Pac. 633 (1913), courts have surmounted the subtleties of this principle by finding a warranty impervious to this limitation. Similarly, courts (and Washington again provides an illustration) skirt the technical statutory requirement of notice of breach of warranty under the Uniform Sales Act by deciding that this technicality is inapposite to a suit for defective foodstuffs where the defendant is a remote supplier. This time, though, the temptation is to rely on the sales act's use of the word "seller" in expressing warranty liability to demonstrate that the sales act's technicalities protect sellers and not more remote suppliers. See *LaHue v. Coca Cola Bottling Co.*, 50 Wn. 2d 645, 314 P.2d 421 (1957).

Warranty liability, however, has not been the open sesame to recovery that one might anticipate from a nonfault principle. The requirement of privity, a factor under Japanese law, is an oft-told story in America. Suffice for here and now that in some states the ultimate consumer who has not dealt contractually with the defendant is legally unable to enforce a warranty, because "privity" is lacking.<sup>43</sup>

Certain other technicalities, traceable for the most part to statutory provisions, also can be conjured up to block a products liability recovery. They are familiar: (1) the requirement of notice of the breach;<sup>44</sup> (2) the power of the defendant to limit or exclude liability by contractual disclaimer;<sup>45</sup> (3) the extent to which reliance on the warranty *as the defendant's undertaking* is essential;<sup>46</sup> and, (4) even though warranty liability sounds like contract language, to what extent may it be eliminated or reduced by consumer misuse—call it what you

<sup>43</sup> In *R. H. Macy & Co. v. Vest*, 111 Ga. App. 85, 140 S.E.2d 491 (1965), absence of privity precluded recovery by a plaintiff, who was burned by a flammable article of clothing, purchased by her mother as a gift for her. The decision did not involve UCC § 2-318. A contrary decision would be anticipated in most states. See *Brown v. Chapman*, 304 F.2d 149 (9th Cir. 1962) (flammable hula skirt; seller liable to burned plaintiff, even though purchase had been made by an aunt and loaned to the plaintiff).

<sup>44</sup> Both UNIFORM SALES ACT § 49 and UCC § 2-607 require notice of the breach. VOLD, *SALES* § 95 (2d ed. 1959). In theory, failure to notify deprives the buyer of any cause of action he may otherwise have had against the seller. In practice, this is not always true, because the courts are wont to by-pass the rule somehow, as by limiting the requirement to instances of commercial loss. See 2 FRUMER & FRIEDMAN, *PRODUCTS LIABILITY* § 19.05 (1965). Somewhat less sweeping in its generosity, but still protective of the consumer who sustains personal injury, is the rule which limits the notice requirement to situations where privity exists. *Wilson v. Modern Mobile Homes*, 376 Mich. 342, 137 N.W.2d 144 (1965); *Dipangrazio v. Salamonsen*, 64 Wn. 2d 720, 393 P.2d 936 (1964); *LaHue v. Coca-Cola Bottling Co.*, 50 Wn. 2d 645, 314 P.2d 421 (1957).

<sup>45</sup> One of the present writers once concluded that the notice requirement of the UCC would not be so readily circumvented. Cosway, *Sales—A Comparison of the Law in Washington and the Uniform Commercial Code*, 36 WASH. L. REV. 50, 79 (1961). This enthusiastic welcome of the notice requirement has not been universal, however. See Speidel, *The Virginia "Anti-Privity" Statute: Strict Products Liability under the Uniform Commercial Code*, 51 VA. L. REV. 804, 835 (1965).

<sup>46</sup> This is the subject of another paper in this symposium. The extent to which a disclaimer is valid against "strict liability" is a matter in which the cases seem too few to identify a categorical rule. See, e.g., *Delta Air Lines, Inc. v. Douglas Aircraft Co.*, 47 Cal. Rep. 518 (App. Div. 1965) (absence of personal injury may be a factor). The paradoxical permission of disclaimers at a time when greater consumer protection is in vogue is analyzed in Note, *Disclaimers of Warranty in Consumer Sales*, 77 HARV. L. REV. 318 (1963).

<sup>47</sup> This, by way of illustration, seems to be the nub of the matter in wholesaler's liability. He is really a conduit for products whose quality he does not in fact control and whose identity is usually unknown to the consumer until injuries are sustained and a lawyer traces the product through its tortuous course from drawing table to breakfast table. See 1 FRUMER & FRIEDMAN, *op. cit. supra* note 7, §§ 16.03(3), 16.04(2); 2 *id.* at § 19.01(3). *Cochran v. McDonald*, 23 Wn. 2d 348, 161 P.2d 305 (1945), refused to imply a warranty against a wholesaler.

will? To speak of contributory negligence at this point is asymmetrical, but the problem is there in some guise.<sup>47</sup>

Thus, though the injured plaintiff is free from the necessity of identifying how the defendant was at fault, and thus in a strategic position superior by far to that provided by *res ipsa loquitur*, he is likely to find some combination of the standard warranty defenses, said to be predicated on the contractual nature of that liability, to present an insurmountable obstacle.

The American law seems to be in the midst of a dramatic breakthrough toward increased consumer protection. While there are learned men who are convinced that the negligence and warranty combination, with their limits, are working well, most experts seem to feel the need for a principle permitting surer recovery by the consumer. The issue may be stated in terms of whether or not a supplier ought to bear the risk of injury due to defects in his product which, regrettably but practically, cannot be eradicated from any human process. There are sufficient ambiguities in this general formulation of the issue to make it virtually useless as a major premise for resolving a particular dispute. The real heart of the matter, though, is in identifying those defects which cannot "practically" be eliminated from the production process. The present differences between the proponents of the fault and nonfault liability concepts center here. If fault, the usual *sine qua non* of tort liability, is to be the basis of products liability, why charge the manufacturer who has done all that is reasonable and economically practicable to remove the defect which slips inexorably through his fine net of precautions? How can such liability motivate him to improve his product when, by hypothesis, he is already doing what the highest level of performance demands?<sup>48</sup>

The nonfault proponents have turned to other areas of policy. Finding it socially desirable to spread unavoidable risk by charging the person who is seeking and enjoying economic gain through the distribution of the product, they rely on the producer to transmit the cost

---

<sup>47</sup> *Maiorino v. Weco Products Co.*, 45 N.J. 570, 214 A.2d 18 (1965), 4 A.L.R. 3d 501. See Sedgwick, Conley & Sleight, *Products Liability: Implied Warranties*, 48 MARQ. L. REV. 139, 154-61 (1964). Misuse by the consumer may take him outside the scope of the warranty, even though a jurisdiction does not apply assumption of risk or contributory negligence to warranty actions. See, e.g., *Pritchard v. Liggett & Myers Tobacco Co.*, 350 F.2d 479 (3d Cir. 1965).

<sup>48</sup> See Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products—An Opposing View*, 24 TENN. L. REV. 938, 945 (1957). *Contra*, Horn & Scarritt, *Products Liability: Doctrinal Problems and the Restatement's Answer* 17 U. FLA. L. REV. 421, 444 (1964).

to the consumer.<sup>49</sup> Certain assumptions may lurk here too, in that not every supplier is economically big and not every consumer is, on the same measure, small.<sup>50</sup> Efforts to analogize this to insurance are stifling, for the premiums seem to be collected after the event. Further, the premiums do not necessarily reflect actuarial determinations.<sup>51</sup> Witness the disturbing plight of the allergic. Whether he is compensated or not,<sup>52</sup> no one seems to suggest a multiple price structure for goods with a high price to allergic users, a low price to known non-allergics, and a medium price to the unidentified. Our market economy is not yet sensitive enough to thus discriminate, and the battle will be lost if the issue as to who bears the risk of loss from injury through defective products is required to await development of such mathematical niceties.<sup>53</sup>

Two significant American doctrinal developments mark today's products liability law: first, the warranty provisions of the UCC, and second, section 402A of the *Second Restatement of Torts* [hereinafter referred to as *Restatement*]. The first has taken mincing steps toward greater consumer protection; the second has stamped heavily into the fray. In substance, the UCC provides warranty protection, yet contains the framework of manufacturer protection by: (1) permitting disclaimer;<sup>54</sup> (2) requiring notice;<sup>55</sup> and (3) taking no position on a major aspect of privity.<sup>56</sup> The UCC has no provision respecting negligence liability. The *Restatement*, on the other hand, recognizes the possibility of negligence liability,<sup>57</sup> but adopts a theory of "simple

<sup>49</sup> See, e.g., Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 366 (1965).

<sup>50</sup> See Smyser, *Products Liability and the American Law Institute: A Petition for Rehearing*, 42 U. DET. L.J. 343, 349 (1965).

<sup>51</sup> The "premiums" referred to are the costs to the consumer included in the price of the goods. The existence of products liability insurance demonstrates that such risks are subject to actuarial technology from the manufacturer's point of view. See Morris, *Enterprise Liability and the Actuarial Process—the Insignificance of Foresight*, 70 YALE L.J. 554 (1961). Morris suggests that the allocation among consumers of the risks of harm through use of goods by including the cost in the price lumps all consumers in a single class, without regard to any variance in risk of injury through use.

<sup>52</sup> See Traynor, *supra* note 49, at 369.

<sup>53</sup> The need for additional economic data has been emphasized as a reason against adoption of the strict liability principle. See Plant, *supra* note 48, at 947. In essence, this is an argument predicated on the burden of proof. The same economic data are essential to decide whether we ought to retain the status quo.

<sup>54</sup> UCC § 2-316.

<sup>55</sup> UCC § 2-607.

<sup>56</sup> UCC § 2-318. This provision deals with the relationship between certain persons, intimately connected with the purchaser, who are protected by the warranty. It does not, however, take a position on the basic privity gap between the consumer and wholesalers and manufacturers with whom no contract is made. See UCC § 2-318, comment 3.

<sup>57</sup> See RESTATEMENT (SECOND), TORTS §§ 395, 404, 406 (1965).



strict" liability,<sup>58</sup> free from any need for proof of faulty handling (but *not*, it must be emphasized, of faulty product)<sup>59</sup> and totally free of the niceties of warranty liability retained by the UCC.<sup>60</sup> The literature on this development is not insubstantial, with arguments pro and con.<sup>61</sup> Perhaps the most serious challenge has nothing to do (on face) with the substantive rule announced, but with the integrity of the announced rule as a "restatement."<sup>62</sup> Carpers might prefer "reshapement." The minimal evidentiary demands placed on a plaintiff in a strict liability case are feared by some as an encouragement to fraud.<sup>63</sup>

Strict liability is predicated on the existence of a defect in the product.<sup>64</sup> A full exploration of the significance of this requirement is essential to an appraisal of the doctrine, but would overly extend this paper. In the clearest of cases, though, one can imagine the presence of an imperfection in a manufactured product which marks that particular item as substandard. The defect may be a foreign substance in food, or a weakened structural part of an automobile,<sup>65</sup> or a defectively soldered joint in an electronic product. Most of the celebrated cases have been of this type—occasional items which have contained defects because of a miscarriage in the production scheme.<sup>66</sup>

The strict liability doctrine has extended, however, to products

<sup>58</sup> The phrase is explained in Dickerson, *The Basis of Strict Products Liability*, 17 BUS. LAW. 157 (1961).

<sup>59</sup> See Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5, 13 (1965).

<sup>60</sup> See RESTATEMENT (SECOND), TORTS § 402A, comment *m* (1965).

<sup>61</sup> At the risk of serious omission, one would list the following articles as those substantially helpful: P. Keeton, *Products Liability—Liability Without Fault and the Requirement of a Defect*, 41 TEXAS L. REV. 855 (1963); Lascher, *Strict Liability in Tort for Defective Products: the Road to and Past Vandermark*, 38 SO. CAL. L. REV. 30 (1965); Noel, *Manufacturers of Products—The Drift Toward Strict Liability*, 24 TENN. L. REV. 963 (1957); Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products—an Opposing View*, 24 TENN. L. REV. 938 (1957); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 60 MINN. L. REV. 791 (1966); Speidel, *The Virginia "Anti-Privacy" Statute: Strict Products Liability under the Uniform Commercial Code*, 51 VA. L. REV. 804 (1965); Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5 (1965).

<sup>62</sup> See Smyser, *supra* note 50, at 345.

<sup>63</sup> See Plant, *supra* note 61, at 949.

<sup>64</sup> The extent to which the plaintiff will bear the burden of identifying the defect and establishing its existence at the time it left the defendant's hands will, of course, be a major factor in extending or limiting the impact of the strict liability concept. The mere fact of injury does not establish existence of a defect. Nor does existence of a defect at some time establish that it is traceable to the particular defendant. Nor does existence of a defect traceable to the defendant necessarily equate to liability since the defect must relate causally to the injuries sustained. The recent Michigan decision in *Bronson v. J. L. Hudson Co.*, 376 Mich. 98, 135 N.W.2d 388 (1965), 45 NEB. L. REV. 189 (1966), provides an illustration of what seems to be a reasonable relaxation of the burden facing the plaintiff to particularize the defect claimed to exist in a product.

<sup>65</sup> Prof. Plant concisely analyzes the impact of strict liability in such a case in his article, *supra* note 61, at 942.

which were faulty in design, where the defect was a characteristic of the generic product.<sup>67</sup> Beyond that is the application of the doctrine to the product which is in fact dangerous, but whose danger is undreamed of in the collective knowledge of mankind.<sup>68</sup> The current cigarette controversy is illustrative.<sup>69</sup> Once the imminence of the risk is generally known to consumer and manufacturer, assumption of the risk would seem to bar recovery. At a time prior to general knowledge of the risk, while scientific information is of limited dispersion, it would seem that the manufacturer may be required to know of risks identified in available literature, mayhap even in a foreign tongue.<sup>70</sup> But until the risk is identified by someone, somewhere, it is a conundrum worthy of Solomon to decide where the risk should lie. Modern miracle drugs and processes may have unsuspected side effects of awesome magnitude on some unidentifiable group of users. The wholesome effect on the rest of mankind dictates, one would think, that development and use of the product are to be fostered. But one is reluctant at this point to predict that the current precepts of our economy are so infallibly just as to demand that the protection of the entrepreneur is of greater social value than is the protection of the occasional victim. This kind of risk may be the very one which must be spread as broadly as possible throughout all society to assuage the suffering of the few, borne for the greater good of the many.<sup>71</sup>

This doctrine of strict liability, divorced from overtones of warranty,

<sup>67</sup> *E.g.*, *Delaney v. Towmotor Corp.*, 339 F.2d 4 (2d Cir. 1964); *Putnam v. Erie City Mfg. Co.*, 338 F.2d 911 (5th Cir. 1964); *Seely v. White Motor Co.*, 63 Cal. 2d 9, 45 Cal. Rep. 17, 403 P.2d 145 (1965); *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 37 Cal. Rep. 896, 391 P.2d 168 (1964); *Suyada v. White Motor Co.*, 32 Ill. 2d 612, 210 N.E.2d 182 (1965); *Bronson v. J. L. Hudson Co.*, 376 Mich. 98, 135 N.W.2d 388 (1965), 45 NEB. L. REV. 189 (1966); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), 75 A.L.R.2d 1; *Berzon v. Don Allen Motors, Inc.*, 23 App. Div. 2d 530, 256 N.Y.S.2d 643 (1965); *Goldberg v. Kollsman Instr. Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81, 230 N.Y.S.2d 592 (1963); *Wights v. Staff Jennings, Inc.*, 241 Ore. 301, 405 P.2d 624 (1965).

<sup>68</sup> Faulty design cases in which strict liability has been imposed are: *Canifax v. Hercules Powder Co.*, 237 Cal. App. 2d 44, 46 Cal. Rep. 552 (Dist. Ct. App. 1965); *Greenman v. Yuba Power Prods. Inc.*, 59 Cal. 2d 57, 27 Cal. Rep. 697, 377 P.2d 897 (1963). See *Wade, Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5, 14 (1965).

<sup>69</sup> See RESTATEMENT (SECOND), TORTS § 402A, comment i (1965); P. Keeton, *Products Liability—Liability Without Fault and the Requirement of a Defect*, 41 TEXAS L. REV. 855 (1963).

<sup>70</sup> See P. Keeton, *supra* note 68, at 868; O'Donnell, *Cigarettes, Cancer and the Implied Warranty of Wholesomeness*, 13 CATHOLIC U.L. REV. 40 (1964); Siler, *Legal Liability in Tobacco Products Cases*, 53 KY. L.J. 712 (1965).

<sup>71</sup> See P. Keeton, *Products Liability—Proof of the Manufacturer's Negligence*, 49 VA. L. REV. 675, 678 (1963).

<sup>72</sup> RESTATEMENT (SECOND), TORTS § 402A, comment k (1965), will not extend liability to such products. See P. Keeton, *supra* note 68, at 867; James, *The Untoward Effects of Cigarettes and Drugs: Some Reflections on Enterprise Liability*, 54 CALIF. L. REV. 1551 (1966).

is in its infancy. Its limits are only adumbrated in the current literature, vast though it is. The existence of the doctrine is, as will be observed, not unknown in Japan, but the inroads it has made in American products liability law bear no Japanese counterpart. There probably are American jurisdictions whose present law more nearly resembles the Japanese law than the generalized statement of the strict liability concept here essayed. Negligence, warranty, and strict liability will all retain utility in the foreseeable future.

Their utility will vary somewhat, depending upon the role played by the supplier. The manufacturer, protected as he often is from warranty liability, is in many cases more readily chargeable with negligence. The retailer, on the other hand, is frequently in no position to control the quality of the goods (such as food in sealed containers), but can bear the brunt of warranty liability from the economic standpoint. Strict liability seems to view these participants in the distribution of goods on a par, so long as the goods are shown to have been defective at the time they left the hands of the particular supplier involved.<sup>72</sup>

In particular detail, there are other signal points of comparison between the Japanese law here outlined and that found in American jurisdictions. Insofar as compensable damages are concerned, one has no reason to foresee any substantial difference between American and Japanese law. Consequential damages, such as personal injury or property damage, proximately flowing from proper use of a dangerous and defective product, are recoverable in America under the various liability theories.<sup>73</sup> Where the only damages suffered reflect the difference in value between what was promised and what was delivered, no problem is foreseen, save for the reminder that the rule stated by the *Restatement* is not applicable, so technical sales warranty rules may be applicable.<sup>74</sup>

---

<sup>72</sup> *Canifax v. Hercules Powder Co.*, 237 Cal. App. 2d 44, 46 Cal. Rep. 552 (Dist. Ct. App. 1965).

<sup>73</sup> See, e.g., *Brown v. General Motors Corp.*, 67 Wn. 2d 278, 407 P.2d 461 (1965).

<sup>74</sup> *Seely v. White Motor Co.*, 63 Cal. 2d 9, 45 Cal. Rep. 17, 403 P.2d 145 (1965). *Price v. Gatlin & Columbia Tractor & Imp. Co.*, 241 Ore. 315, 405 P.2d 502 (1965). There is a recent celebrated holding that the privity rule may not be applicable in such cases, marking an extension of the elimination of that requirement. *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965). See also Rapson, *Products Liability Under Parallel Doctrines: Contrasts Between the Uniform Commercial Code and Strict Liability in Tort*, 19 RUTGERS L. REV. 692 (1965); Note, 19 RUTGERS L. REV. 715 (1965); Cumming, *Manufacturer's Responsibility for Defective Products: Continuing Controversy Over the Law to be Applied*, 54 CALIF. L. REV. 1681 (1966). By the weight of authority the loss of the benefit of the bargain is not recoverable in a negligence action. See *Inglis v. American Motors Corp.*, 3 Ohio St. 2d 132, 209 N.E.2d 583 (1965).

The statute of limitations, too, may be expected to shift somewhat, depending upon whether relief is predicated on warranty under the UCC or on the theory of the *Restatement*.<sup>75</sup> In due time, one would predict that this too shall pass and that some universally applicable prescription period will be found.

## VI. TORT LIABILITY OF THE MANUFACTURER

### A. In General

In Japan, where privity is indispensable to contract liability, the consumer is typically forced to rely on a manufacturer's negligence if recovery is to be enjoyed. In some tort areas Japan does recognize strict liability—imposing liability without negligence.<sup>76</sup> This has not, though, been applied to products liability.

Once the defendant's negligence has been established under Japanese law, there is usually no need to find some form of aggravated negligence. In a case wherein the consumer has been negligent, however, liability of the manufacturer may have to rest upon the intentional infliction of harm, or on a showing that his negligence was comparatively greater than that of the plaintiff.<sup>77</sup>

In Japan there are two circumstances justifying a finding of negligence. (1) The defendant failed to prevent harm because he did not foresee that harm, though he should have foreseen it. In short, the defendant must foresee what an ordinary person in defendant's position would have foreseen. Thus, if the defendant undertakes to perform a particular role or occupation, he will be tested by what the ordinary person in that occupation would foresee.<sup>78</sup> (2) The defendant did not take appropriate action to prevent the occurrence of

<sup>75</sup> See Rapson, *supra* note 74 at 704. In *Rosenau v. City of New Brunswick*, 93 N.J. Super. 49, 224 A.2d 689 (1966), the warranty theory of limitations was applied to strict liability. Cf. *Shahade v. Clairol, Inc.*, PROD. LIABILITY REP. ¶ 5673 (U.S.D.C. Conn. 1966).

<sup>76</sup> *E.g.*, the owner of a business operating a nuclear reactor in Japan is strictly liable for personal injuries resulting from such operation, with some exceptions. *Genshiryoku songai no baishō ni konsuru hōritsu* (Law concerning reparation of injury due to nuclear radiation) (Law No. 1140 of 1961). See also TANIGUCHI & UEBAYASHI, *SONGAI BAISHŌHŌ GAISETSU* (Outline of the law of damages) 17, 19 (1964): "Thus, in Japan we can find some legislation recognizing strict liability, but compared to other countries the scope of recognized strict liability is exceedingly narrow."

<sup>77</sup> The American lawyer will recognize this as comparative negligence, usually ignored in favor of a rule of contributory negligence. See 1 FRUMER & FRIEDMAN, *PRODUCTS LIABILITY* § 13 (1965).

<sup>78</sup> The American lawyer will identify the reasonably prudent man. See *Products Liability—The New Frontier*, 13 FEDERATION INS. COUN. Q. 7, 21, 38 (1963).

harm he did foresee. Again, the standard is that of an ordinary man in the position of the defendant.

These two circumstances set the predicates for products liability in tort. There is no reason to distinguish negligence in the operation of a business from ordinary negligence, insofar as tort liability is concerned, though such a distinction may be relevant to criminal liability.<sup>79</sup> Of course, the manufacturer will be held to the expertise prevalent in the trade, and this might impose liability in instances in which an unskilled layman would not be held. There are, indeed, certain products such as food, drugs, toys, and machinery whose manufacturers are under severe responsibility because of the dangerous nature of the product.<sup>80</sup>

### *B. Tort Liability of the Food Processor*

In Japan, there are occasional, and increasingly frequent, suggestions that strict liability ought to be imposed on the food processor. However, the present Japanese Civil Code's principle of negligence liability encompasses the food cases along with all other products. As yet, there is no civil judgment in Japan imposing liability on the food manufacturer.

In the milk products case, the criminal aspect of which has been previously alluded to,<sup>81</sup> some seventy persons instituted civil suits for damages, but voluntarily dismissed their actions.<sup>82</sup> The stated reason for withdrawal of the actions was that plaintiffs' doctors' fees, other medical costs, and court costs were paid by the manufacturer, pursuant to the opinion of the "Five Man Committee." The date of the withdrawal, though, seems significant, for it was after the decision in the criminal case; the plaintiffs may have withdrawn their actions

---

<sup>79</sup> Shinomiya, *Gyōmujo no kashitsu* (Negligence in the conduct of business), 9 Sōgō HANREI KENKYŪ SŌSHO, MIMPŌ 97 (1964).

It might be noted that at one time in Japan a combined criminal proceeding and tort action was recognized. 4 SUEHIRO & TANAKA, HŌRITSUGAKU JITEN (Dictionary of jurisprudence) 2329-34 (1936). In 1880 the Japanese criminal procedure law adopted the system of an incidental private action after Code d'instruction criminelle (1808) of France. Thus, the former Japanese Criminal Procedure Code article 567 (Law No. 75, 1922) provided: "A person who has been injured in body, freedom, reputation or property by an offence or offences may sue the accused incidentally to the criminal procedure for a claim or claims caused by the offence or offences." This procedure is no longer followed, however. (The authors are indebted to Mr. Toshio Miyatake for the information contained in this paragraph.)

<sup>80</sup> KATŌ, FUBŌKŌI 91, in 22 HŌRITSUGAKU ZENSHŪ (1957).

<sup>81</sup> See text accompanying notes 17-20 *supra*.

<sup>82</sup> Takezawa v. Morinaga Nyūgyō K.K., unreported case (Okayama Dist. Ct., No. 161 (*wā*), 1956); Oyama v. Morinaga Nyūgyō K.K., unreported case (Okayama Dist. Ct., No. 531 (*wā*), 1956).

because they were not sanguine about their chances of recovery in view of that decision.

On principle, though, there is a distinction between establishing negligence in a penal case, where the sanctions are greater and thus the proof must be heavier, from the circumstances in a civil case, where only indemnification of loss is sought. One who had been negligent in such a fashion to be subject to criminal culpability would also be civilly responsible, but the converse is not necessarily true. In a civil case, the court could admit a penal conviction as evidence that the defendant was negligent, but the court could not admit a criminal acquittal to support a finding of no negligence in a civil case.<sup>83</sup> Thus, in the milk products case, civil liability to the consumer might have been found, in spite of a finding of innocence of criminal negligence.

The American lawyer will see many similarities to his own practice. The differing burdens of proof in civil and criminal cases and the usual criminal rule in the United States previously mentioned, requiring excessive negligence or even recklessness, would provide bases for a distinction similar to that existing in Japan. On the other hand, the processor of food is now almost universally recognized as being liable for injuries caused by defects in his products, without regard to carelessness *vel non* and without any necessity of establishing privity.<sup>84</sup>

### C. Negligence of Drug Manufacturers

In the one reported Japanese case involving a negligence action against a drug manufacturer, the plaintiff claimed damages for sustaining cataracts as a result of using an eye-lotion.<sup>85</sup> Evidence at the trial disclosed that the eye-lotion had the properties of a bleach and that even though used only once the eye-lotion would produce cataracts, even if the patient was not allergic. The court concluded that had the defendant subjected the eye-lotion to additional experiments prior to marketing, the defendant could have avoided occurrence of the injury. However, the court took note that available literature contained no description of this type of injury; and, though many persons used the lotion, very few claimed injury. As a result, the court found very slight negligence on the defendant's part and awarded the plaintiff 50,000 yen (about \$140). It is to be observed that had there been

<sup>83</sup> KATŌ, *op. cit. supra* note 80, at 76.

<sup>84</sup> See Green, *Should the Manufacturer of General Products Be Liable Without Negligence?* 24 TENN. L. REV. 928 (1957).

<sup>85</sup> Katō v. Nansō Seiyaku K.K., 6 Kakyū minshū 1440 (Tokyo Dist. Ct., July 14, 1955).

more numerous cases of injury, greater negligence might have been found on the part of the manufacturer, and hence, a larger recovery.

Though this is the only reported case involving products liability of drug manufacturers in Japan, there are other cases pending:

(1) Parents of children deformed at birth, allegedly due to use of the drug "Saridomoido" by mothers during pregnancy, have claimed damages from the drug's manufacturer.<sup>86</sup> One of the complaints<sup>87</sup> alleges: that the defendant manufacturer inaugurated the sale of its product with an intensive advertising campaign describing the drug as "a new nonhabitual sleeping drug" and emphasizing its safety; that a drug manufacturer owes a duty to determine the virulence, ill-effects, etc., of a new medicine before marketing it; that by advertising the drug to be safe for all people, the defendant bears an additional duty to assure the drug's harmlessness to pregnant women; that the defendant marketed the drug without assuring itself of its safety; and that in so doing the defendant was negligent. Plaintiffs are seeking damages of twenty-four million yen (about \$66,667).

(2) The Tokyo District Court recently received a complaint by a physician against a blood bank.<sup>88</sup> The physician had purchased blood from the defendant and had given a transfusion to a patient. The patient died as a result of the transfusion, the blood having been contaminated with harmful bacteria. Plaintiff was the subject of a widely publicized investigation by the Tokyo Procurator's Office in relation to a possible accidental homicide charge. Further, plaintiff was sued by the patient's family. The result was a demonstrable decrease in the number of patients at plaintiff's clinic, for which plaintiff is seeking damages of six million yen (about \$16,667).

The American lawyer will sense a certain companionship with his Japanese counterpart, and will perceive such issues as: (1) Insofar as the blood transfusion case is concerned, is the physician liable to the patient's family at all, either on negligence principles (inasmuch as he probably cannot be expected to apply elaborate tests) or on warranty (absent a sale)?<sup>89</sup> Insofar as strict liability is concerned, because of

---

<sup>86</sup> In the Kyoto District Court, case No. Wa-1242 (Nakamori v. Dai-Nihon Drug Mfg. Co.), 1964; No. Wa-36 (Nishioka *et al.* v. Dai-Nihon Drug Mfg. Co., 1964); and No. Wa-251 (Tsuboi *et al.* v. Dai-Nihon Drug Mfg. Co., Ltd.), 1965. In the Nagoya District Court, case No. Wa-1152 (Ono v. Dainihon Drug Mfg. Co.), 1963.

<sup>87</sup> Case No. Wa-1242, *supra* note 86.

<sup>88</sup> The Tokyo District Court (23d Division), case No. Wa-5153 (Taku-Kishum v. Sogō Blood Bank, Ltd.), 1965.

<sup>89</sup> See *Gile v. Kennewick Hosp. Dist.*, 48 Wn. 2d 774, 296 P.2d 662 (1956). California has a special statute dealing with blood plasma. See 1 FRUMER & FRIED-

its close connection with warranty, the classification of the relationship as one of service rather than one of sale probably excludes strict liability also.<sup>90</sup> (2) The claim of the physician for economic loss would, historically at least, be troublesome. The sympathetic appeal of the claimant who has sustained personal injury seems to have been a factor in liberalizing the rules governing his recovery. The *Restatement's* rule, though, is not limited to personal injury. (3) The drug purveyor or manufacturer will be liable if negligence is established, but whether strict liability is applicable is an open question. The *Restatement* answer is that strict liability does not apply to "unavoidably unsafe products" of which drugs are an illustration.<sup>91</sup>

#### *D. Negligence of Suppliers of Products Other Than Food and Drugs*

No Japanese decision has been found to impose liability upon the manufacturer of goods, other than the drug cases already discussed. In theory, however, the manufacturer can be held responsible for defects in the design or fabrication of his product.<sup>92</sup>

In the United States, there is no dearth of authority concerning the liability of suppliers of practically any kind of manufactured or processed product. Wholesalers and retailers part company with manufacturers because the operation of the reasonably prudent man test produces differing consequences. The manufacturer is not an insurer, but he will bear the brunt in cases predicated on negligent design or manufacture.<sup>93</sup> A retailer must use reasonable care in handling the goods, and it would appear that any failure to do so will subject him to liability and may, at the same time, exculpate the manufacturer. Any seller, be he manufacturer or not, must make a reasonable inspection of

MAN, *op. cit. supra* note 77, § 16.04(3)(b). There may be no test which can be applied to ascertain the presence of a particular defect. See Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 367 (1965).

<sup>90</sup> See RESTATEMENT (SECOND), TORTS § 402A (1965), which imposes liability on one who sells, provided he is in the business of selling.

<sup>91</sup> RESTATEMENT (SECOND), TORTS § 402A, comment k (1965).

<sup>92</sup> KATŌ, *op. cit. supra* note 80, at 92-93. Katō, *Seisōbutsu sekinin* (Products liability), in 19 NAKAGAWA, CHŪSHAKU MIMPŌ (Commentary on the Civil Code) 138 (1965).

<sup>93</sup> The *sine qua non* of negligence liability is foreseeability of unreasonable risk of harm. In Japan, as has been observed, a manufacturer, because of his expertise, may be held to anticipate more than a layman. This, of course, is true in the United States, but in addition holdings are extant that the burden on the manufacturer may involve something more than following the pattern of his competitors. Dean Page Keeton has written: "Some recent cases make it clear that the manufacturer is not to be tested as to knowledge on the basis of what manufacturers generally know. Rather, he must keep reasonably abreast of scientific information and discoveries on all ingredients or components used in his products." Keeton, *Products Liability—Proof of the Manufacturer's Negligence*, 49 VA. L. REV. 675, 677 (1963).



his product, but the nature of the product may be such as to preclude any inspection at all (as in the case of products sold in sealed containers), or the circumstances may show that the purchaser would not normally expect an inspection by his immediate seller.<sup>94</sup> Both manufacturer and seller owe a duty to warn against any elements of a product which they know, or ought to know, are dangerous, and which are not such dangers as to be obvious to any user.<sup>95</sup>

### *E. Sequence of Cause and Effect*

There appears to be no difference between American and Japanese law on the need for tracing any injury to the product, and any defect in the product to the defendant. Strict liability under the doctrine of the *Restatement* does not obviate this requirement, for the liability is not absolute. Common sense tells us that the onus of proving that a defect existed in a product when it left the manufacturer's hands will vary from one product to another. A bug in a bottle is easier to trace to the manufacturer or bottler than is a "bug" in a steering mechanism of a car, particularly a vintage model. In Japan, too, a court ought to find liability on the manufacturer's part for defects which are unlikely to occur after the product leaves the manufacturer's hands.<sup>96</sup>

## VII. CONTRACT LIABILITY OF THE MANUFACTURER

As previously noted, contractual liability of the manufacturer in Japanese products liability law is of little practical importance. To reiterate, it is only in the clearest case that contractual recovery is even theoretically possible; *i.e.*, that case where the manufacturer has warranted to the buyer who is personally injured that the goods sold will be free from defects. In such case the manufacturer would be liable on the theory of default of obligation under Civil Code article 415. In ordinary business practice such warranties are not made by Japanese manufacturers directly to Japanese consumers. Even if the manufacturer's warranty against defects should be judicially implied under the Latent Defects (*kashi tampo*) doctrine (Civil Code article 570), it would be the rarest case when the injured party would be in privity of contract with the manufacturer.

The hurdles thwarting the Japanese products liability plaintiff are

---

<sup>94</sup> Cf. *Bower v. Corbell*, 408 P.2d 307 (Okla. 1965). See 1 HURSH, *AMERICAN LAW OF PRODUCTS LIABILITY* §§ 2.18, 2.20 (1961).

<sup>95</sup> See 1 HURSH, *op. cit. supra* note 94, § 2.29.

<sup>96</sup> Katō, *supra* note 92, at 135.

somewhat overcome in the United States by resort to implied warranties and by judicial relaxation of the privity requirement. But even in the United States, contractual theories of products liability recovery are not free from difficulties. For example, in the United States, where the Uniform Sales Act is in effect, it is at least arguable that implied warranties of merchantability exist *only* in transactions involving unspecified goods and not at all in sales of identified chattels. The reason is that section 15 of the Uniform Sales Act imposes a warranty of quality (merchantability) in the following terms: "Where goods are bought by description from seller who deals in goods of that description . . . there is an implied warranty that the goods shall be merchantable quality." The requirement of a sale by *description* seems to exclude the purchase and sale of a definite and specific item, such as the purchase of a can of beans selected by the customer from a grocery shelf. This requirement was not always adhered to by the courts, but where it was, the American rule has precluded otherwise deserving plaintiffs from recovery.

Under the UCC, however, there is no requirement of a sale by description; thus, there may be warranties in the sale of particular goods. Specifically, there would be a warranty of merchantability,<sup>97</sup> but it is not likely that there would be a warranty of fitness for any particular purpose of the buyer.<sup>98</sup> Both warranties may be found, though, in sales of unascertained goods.

It is a truism in the United States that warranty liability is not predicated on negligence. It is rare, by comparison, in Japan that this is true. Typically, indeed, the supplier's liability is based on negligence. This liability is essentially the same as that of the tort liability of the supplier, previously discussed, but with one signal difference: the burden of proving freedom from negligence rests upon the supplier in a breach of warranty action. In suits based upon tort liability, on the other hand, it is part of the plaintiff's case to establish that negligence.

This admixture of negligence and breach of warranty is strange to one trained in American legal mores, and yet the picture in the United States is not entirely free of the problem. While the plaintiff in a warranty suit is not required to show lack of due care in the manufacturing or handling process, vestiges of tort theory exist in such questions as: (1) Does the contributory negligence of the user bar

---

<sup>97</sup> UCC § 2-314.

<sup>98</sup> UCC § 2-315.

recovery for breach of warranty? (2) Which statute of limitations governs the action—contract or tort? (3) A comparatively recent debate centers around the relevance of jurisdictional long-arm statutes (often written in “tort” language) to breach of warranty.<sup>99</sup>

#### VIII. THE FUTURE OF PRODUCTS LIABILITY

Both in the law of Japan and of the United States, the prognosis is that increased consumer protection will develop. The next step in Japan will probably occur in the liability of suppliers of food and will in all likelihood take the form of strict liability, *i.e.*, liability without proof of negligence. Just how this will come about is not too certain, there being three possible developments: (1) a special statute; (2) recognition that Civil Code article 709 is not without exceptions; or (3) use of warranty liability.

In the United States, developments will center about the doctrine of *Restatement (Second), Torts* section 402A and about the Uniform Commercial Code. Not all states will accept the full impact of the former formulation, so it will be some time before a uniform approach can be found. For those states, such as California and New Jersey, which find themselves in the forefront of the expansion of consumer protection, there will be a time for providing some needed details in the application of the rule. The broad policy seems to have been stated, however, in terms of greater consumer protection for the days immediately ahead.

---

<sup>99</sup> See Comment, *In Personam Jurisdiction Over Nonresident Manufacturers in Product Liability Actions*, 63 MICH. L. REV. 1028 (1965).